APPENDIX.

Portions of the Michigan Drain Law Applicable to Case.

This appendix is intended to furnish a guide for the court to applicable portions of Michigan drain statutes. It omits chapters relating to inter-county drains and portions inapplicable to this and the three companion cases covered by the opinion of the Circuit Court of Appeals, directing entry of decrees which are sought to be reviewed. The codification of Michigan statutes relating to drains is Act 316, Public Acts of Michigan 1923. This was amended in some particulars by Acts 365 and 331 of the Michigan Public Acts of 1925 and 1927, respectively. At the beginning of each section we indicate the year in which the section was enacted. Unless otherwise indicated, the section remained in that form during succeeding years material to these cases.

Ch. I, Sec. 2 (1925) The word "drain" whenever used in this act shall be deemed to include any water course or ditch, opened or proposed to be opened, and improved for the purpose of drainage, and any artificial ditch or drain levee, dyke or barrier, or tile drain proposed or constructed for such purpose, structures and such mechanical devices as will properly purify the flow of such drains.

Ch. III, Sec. 1 (1923) Before a commissioner takes any action on any application to locate, establish and construct any drain, there shall first be filed with him an application to lay out and designate a drainage district with reference to a proposed drain therein; such application shall describe such proposed drain by its starting point, its general direction and terminus. The application shall be signed by not less than ten freeholders of the township or townships in which such proposed drain, or the proposed lands to be drained thereby, may be situated: Provided, That one-half of said signers shall be owners of land liable to an assessment for the construction of such proposed drain: Provided Further, If it shall appear upon filing an application to lay out and designate a drainage district that said district might not include ten freeholders whose lands would be

liable for such assessment, in such case such application shall be received if signed by any freeholders liable to an assessment for the construction of such proposed drain. The eligibility of the signers to such application shall be determined by their interest of record in the office of the register of deeds, in the probate court or in the circuit court of the county in which such lands are situated at the time such application is filed.

(A slight change in this section was made in 1927, not material to this case.)

Ch. III, Sec. 2 (1923) Upon receipt of such application for new drainage district, the commissioner shall immediately cause a survey of such proposed drain to be made by a competent surveyor or engineer: Provided, That if the application shows, or it shall be determined after the survey, that any such proposed drain will traverse more than one county or will affect lands liable for assessment for benefits in more than one county, said commissioner shall proceed under the portions of this chapter relating to inter-county drains. If upon such survey, or if before such survey is made, the commissioner shall determine that the proposed drain is impractical, he shall take no further action thereon but shall, in writing, notify the person or persons who delivered such application to him, of that fact, and his reasons for making such determination. If upon such survey the said commissioner shall determine such proposed drain to be practical, he shall lay out a drainage district, including therein all tracts or parcels of land, highways, townships and cities which would be benefited by the construction of such proposed drain, and which would be liable to an assessment therefor, should such drain be constructed as hereinafter provided.

Ch. III, Sec. 4 (1923) The commissioner shall thereupon prepare his order designating a drainage district so laid out and give it a name or number and describe therein the several tracts and parcels of land, highways, townships, and cities which would be benefited by the construction of such proposed drain and would be liable to assessment therefor. Also a description of the drain proposed in such application

showing its beginning, route, terminus, width, depth, yards of earth necessary to be removed in such proposed construction, and the estimated cost of such construction. The order designating such drainage districts, together with the application therefor, shall thereupon be filed in the office of the county drain commissioner of the county in which such drainage district is situated. The commissioner shall give notice of filing such order designating a drainage district by publishing a notice once in each week for two successive weeks in a newspaper, or newspapers, of general circulation in the county in which such district is situated, which notice shall give a general description of the route of the proposed drain as shown by the survey, and the names of the freeholders whose lands would be traversed thereby.

(A slight change in this section was made in 1927, not material to this case.)

Ch. IV, Sec. 1 (1923) After a drainage district has been established and the order therefor filed with the county drain commissioner, a petition to locate, establish and construct a drain may be filed with the commissioner having jurisdiction of the lands designated in such order as would be benefited by such construction. Such petition shall ask for the location, establishment and construction of a drain which will properly drain the lands described in such order. The petition shall be signed by a number of freeholders in said drainage district whose lands would be liable to an assessment for benefits equal to one-half of the number of freeholders whose lands would be traversed by said drain. The eligibility of the signers to such petition shall be determined by their interest of record in the office of the register of deeds, in the probate court or the circuit court of the county in which such lands are situated, at the time such petition is filed. Such petitioners shall be jointly and severally liable for all costs and expenses for the filing of such petition in case the proceeding shall be dismissed. If the persons signing such petition shall refuse to pay such costs and expenses, the commissioner shall bring suit in a court of competent jurisdiction and collect such costs and expenses. If the financial responsibility of petitioners shall

upon the filing, or thereafter, be determined insufficient, additional signatures may be required or such security furnished as will be approved by the commissioner.

Ch. IV, Sec. 2 (1923) Upon the filing of such petition, the commissioner authorized to act thereon shall as soon as practicable thereafter serve upon the judge of probate of the county a copy of said petition. Within fifteen days after the service of said notice upon him it shall be the duty of the judge of probate so notified to appoint a board of determination, to call a meeting thereof at some place to be designated by said judge and which shall be as centrally located as possible within the drainage district, giving notice of the time and place of such meeting, and the said judge shall cause a copy of such notice to be published for not less than one week in a newspaper published and in general circulation in the county. The said board of determination shall be composed of three members each of whom shall be the supervisor of a township within such county into which the drainage district does not extend. At the time and place fixed in said notice said board shall meet, elect a secretary and proceed to determine the necessity of said proposed drain and whether the same is necessary and conducive to public health, convenience and welfare. At such meeting all persons owning lands liable to assessment for benefits, or whose land shall be crossed by said drain, or any district or municipality affected, may appear for or against said drain proceeding. After hearing the evidence so offered as herein provided, the board shall make their determination upon the necessity of such drain and whether the same is necessary and conducive to public health, convenience and welfare.

If the said board shall find by a majority vote of the whole number of members present and voting thereon that the said drain is not necessary or conducive to public health, convenience or welfare, they shall file with the Commissioner an order dismissing the petition and no further petition for said drain shall be entertained within one year after such determination. If said board by a majority vote, as aforesaid, shall find the said drain so proposed to be necessary and conducive to the public health, convenience

and welfare, they shall make their order to that effect and file the same with the said commissioner.

Upon the receipt of the order of said board, the commissioner shall make his first order of determination in writing, giving the name or number of the drainage district, and shall establish the commencement, route, and terminus of said drain and the width, depth and length thereof, a copy of which order he shall within five days file in his office.

(A slight change in this section, relating to the number of persons who should constitute the board of determination, was made in 1927. The balance of the chapter relates to procedure to obtain right-of-way.)

Ch. VI, Sec. 1 (1925) Upon the release of the right of way and damages, or upon the determination and return of the special commissioners, the commissioner shall make his final order of determination establishing the drain, which drain shall be divided into convenient sections for the letting of contracts. A certified copy of said order of determination shall be filed with the county drain commissioner within five days after such order is made. He shall before the day of letting and review apportion the per cent of the cost of construction of such drain which any township or city traversed or benefited thereby shall be liable to pay by reason of the benefit to the public health, convenience or welfare, or as the means of improving any highway under the control of such township or city. He shall apportion the per cent of the cost of construction of such drain which any highway then under the control of the state, county or township highway commissioners shall be liable to pay by reason of benefits therefor, and he shall also apportion the per cent of benefits to accrue to any piece or parcel of land by reason of the construction of such drain and above the per cent apportioned to any township or city at large or to any highway, as above provided. Such per cent so apportioned when finally approved shall be assessed against such township, cities, highways and lands according to such apportionment of benefits as hereinafter provided. The apportionment of benefits so made shall be subject to review and correction and may be appealed from as in this chapter provided. The board of

supervisors at its October meeting of each year shall make provision by proper assessment of the amounts apportioned against any highway under control of district highway commissioners and any highway under control of county highway commissioners.

(A slight change was made in this section in 1927 in relation to assessments against municipalities.)

Ch. VI, Sec. 4 (1925) The commissioner shall give notice for the holding of a public meeting, at which a review will be had of the apportionment of benefits made as aforesaid and also for the purpose of letting a contract or contracts for the construction of such drain. Notice of such hearing shall be given by publishing a notice thereof, at least two insertions in some newspaper published and of general circulation in the county, if there is one. Such notice shall be so published at least once not less than ten days prior to the hearing. The commissioner shall also give notice of such hearing by posting notices thereof in five conspicuous and public places in each township where the district is located, within the limits of said districts at least ten days prior to such hearing: Provided, That in all cases where the apportionment of benefits shows less than one hundred descriptions upon which benefits have been apportioned, personal service shall be had upon all resident land owners within the drainage district, at least ten days prior to such hearing. As to all other land owners, notice shall be given by posting and publication as above provided. Such notice shall also be personally served upon the supervisor of each township affected, the mayor of each city and upon the chairman of the highway commissioners having charge of any highway apportioned a per cent of the cost of such construction. Such notice shall contain the names of all cities, townships or highways affected. Such notice shall contain a description of the several tracts or parcels of land constituting the special assessment district of such drain: Provided, That it shall not be necessary to subdivide any tract or parcel beyond the point where the whole thereof is within such drainage district or to describe the said drain further than by reference to it by its name or number, and it shall also state the number and length of

sections; the average depth and width of each section; and in case of tile drains, the amount and specifications of all tile required; the location, number, type and size of all culverts and bridges and the conditions upon which the said contract or contracts will be awarded; and in no case shall said notice contain the minutes of survey or table of cuttings which shall be kept on file in the office of the drain commissioner and be open to inspection at the time and place of such letting, and that at the time and place of such letting, or at such other time and place thereafter to which the county drain commissioner may adjourn the same, the apportionment of benefits and the lands comprised within the special assessment district shall be subject to review for at least one day; such review shall be held open from nine o'clock in the forenoon until five o'clock in the afternoon. On such reviews the supervisor or commissioner of highways of any township may appear on behalf of such township. The mayor or some officer of the city designated by him may appear for such city, and any district or county road commissioner may appear on behalf of such district or county. At such review the county drain commissioner shall hear the proofs and allegations of all parties interested, and shall carefully reconsider and review the description of land comprised within the special assessment district, the several descriptions and appointment of benefits, and define and equalize the same as may seem just and equitable. Whenever an apportionment of benefits shall be made against a state trunk line highway, the drain commissioner shall at least twenty days before the review thereon notify by registered mail the state highway commissioner of the percentage apportioned against such highway and the date and place fixed for the review of all apportionment of benefits. If the state highway commissioner desires to have such apportionment of benefits reviewed by the state commissioner of agriculture, he shall within ten days from the receipt of such notice, file with the drain commissioner an objection to the apportionment. The drain commissioner shall then notify the state commissioner of agriculture of the day and place fixed for such review of apportionments and at such meeting the commissioner of agriculture or some deputy selected by him, shall review the apportion-

ment made against the said state trunk line highway, listen to the proofs and allegations of the parties and may view the highway benefited, and his action and decision, thereon, reduced to writing shall be final.

(Slight changes made in this section in 1927, relating to service and publication of notice.)

Ch. VI, Sec. 11 (1923) The proceedings in establishing any drain shall be subject to review upon certiorari, as herein provided. Notice of such certiorari shall be served upon the commissioner within ten days after the copy of the final order of determination of such commissioner in establishing any drain has been filed in his office as provided in section one of chapter six in the same manner as notice is required to be given of certiorari for reviewing judgments rendered by justices of the peace, and the writ shall be issued and served, and bond given and approved and the subject matter brought to issue in the same time and manner, as near as may be, as in such cases provided, except that such certiorari may be heard by the court during term, or at chambers, upon five days' notice given to the opposite party; and the circuit court of the county shall hear and determine the same without unnecessary delay, and if any material defect be found in the proceedings for establishing the drain, such proceedings shall be set aside. If the proceedings be sustained, the party bringing the certiorari shall be liable for the costs thereof, and if they be not sustained, the parties making application for the drain shall be liable for the costs. If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and its legality shall not thereafter be questioned in any suit at law or equity: Provided, No court shall allow any certiorari questioning the legality of any drain by any person unless notice has been given to the commissioner in accordance with the provisions of this chapter: Provided further, That when such proceedings are brought, the commissioner shall postpone the letting of contracts and all other proceedings until after the determination of the court. And if any error be found in the proceedings, the court shall direct the commissioner

to correct such error or errors and then proceed the same as though no error had been made.

(Slight changes made in this section in 1927, relating to procedure where errors occur after the final order of determination.)

Ch. IX, Sec. 3 (1923) Whenever the amount assessed for the construction of any drain shall not be sufficient to complete the same, and to pay all the costs and incidental expenses or to pay the principal and interest on bonds if such are issued, a further assessment shall be made to meet the deficit or additional expense. Such further assessment shall be apportioned, assessed, levied and collected as provided in the first instance, and on the same percentage, and shall be collected in one year, but there shall be no review of nor appeal from such further assessment.

Ch. X, Sec. 1 (1923) Within ten days after the letting of contracts, or in case of an appeal, then forthwith after such appeal shall have been decided, the commissioner shall make a computation of the entire cost of such drain which shall include (1) all the expense of laying out and designating the drainage district, which item of expense shall include the entire cost of the survey; (2) the expense of locating, establishing and constructing the drain; (3) the fees and expenses of special commissioners; (4) the compensation to be paid the board of review; (5) the cost of construction of bridges and culverts; (6) the contracts for the construction of the drain, or other work to be done on said drain; (7) the estimated cost of an appeal in case the apportionment made by the commissioner shall not be sustained; (8) the expenses of the state commissioner of agriculture, where called; (9) the cost of publishing all notices required; (10) and all fees of the probate judge, and he shall add the whole into a gross sum and add thereto five per cent of said gross sum to cover contingent expenses and the entire sum so ascertained shall be deemed to be the cost of construction of such drain.

Ch. X, Sec. 2 (1923) The Commissioner shall thereupon make a special assessment roll for such drain for each township, city or highway affected thereby, which roll shall be

designated "(giving the name) drain special assessment roll," and he shall enter therein a correct description of the tracts, parcels or subdivisions of land benefited by such drain and place opposite each description the amount of the per cent heretofore determined upon by him or by the board of review, as the case may be. He shall also enter thereon the amount of the per cent apportioned to such township, city or highway, and in case such amount be payable in installments, he shall also enter thereon a memorandum of the installments thereof and of the year or years when such installments shall be spread; and shall add a certificate in writing of the determination whether the taxes assessed for benefits shall be paid in one or more years. Such rolls shall be dated and signed by said commissioner and filed on or before the last Wednesday in September in each year, in the office of the county clerk.

(Slight changes in procedure were made in a 1927 amendment to this section.)

Ch. X, Sec. 5 (1923) All drain taxes assessed under the provisions of this act shall be subject to the same interest and charges, and shall be collected in the same manner as state and other general taxes are collected, and collecting officers are hereby vested with the same power and authority in the collection of such taxes as are or may be conferred by law for collecting general taxes. Drain taxes, when collected, shall be returned to the county treasurer to be disbursed by him. In all cases where suit is brought against the collector arising out of the collection of any drain tax, the county shall defend such officer in the same manner that he has now the right to be defended in the collection of general taxes. No suit shall be instituted to recover any drain tax or money paid or property sold therefor, or for damages on account thereof, unless brought within thirty days from the time of payment of such money to, or sale of such property by, the collecting officer; and if such tax shall be paid under protest the reasons therefor shall be specified, and the same procedure observed as is or may be required by the general tax law. All taxes levied under the provisions of this act, with all lawful costs, interest and charges, shall be and remain a perpetual lien upon

the lands upon which they are assessed, and a personal claim against the owner or owners of such lands until they are paid.

Ch. X, Sec. 6 (1923) If the taxes levied for the construction, cleaning out, widening, deepening, straightening, or extending of any drain are not collected by the township or city treasurer, they shall by him be returned, together with the lands upon which they were levied, to the county treasurer in the same return, at the same time, and in the same manner, in every respect (naming in each case the particular drain), as lands are returned for state, county and township taxes, and such taxes shall follow such lands, the same as all such other taxes, and all the general provisions of law now existing, or that may be hereafter enacted for enforcing the payment of township, county and state taxes, shall apply to such drain taxes, and to the lands returned delinquent therefor, in the same manner and with like effect.

Ch. X, Sec. 14 (1923) In any suit brought to set aside any drain tax, or in any way attacking the legality of any drain proceedings, the commissioner shall be made a party to said suit.

Ch. X, Sec. 15 (1925) In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than three installments, said commissioner may borrow money in anticipation of the collection of all installments after the first and may issue as evidence thereof the bonds of the drainage district as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied exclusive of the first installment. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable at such time or times, not exceeding ten years from the date thereof, as may be determined upon by the commissioner or as may be required by the date of maturity of the installments levied, it being the intent hereof that the dates of maturity of obligations issued hereunder shall be as nearly identical as is practicable with the collection of

the installment of drain taxes. (Provided that in cases where the estimated cost of any drain exceeds ten dollars per running foot, the drain commissioner may in his discretion determine that bonds issued hereunder may be made payable in not to exceed fifteen years from the date thereof). The commissioner shall prescribe the form of the bond and shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities and highways assessed at large, in the proportion that they are taxed for the benefits received thereby. In no case shall such bonds be sold for less than par and accrued interest. If any premium is received thereon such premium shall belong to the fund of the drain. The commissioner may make payment or partial payment of the cost of the drain in such bonds, or may sell part or all thereof, depositing the proceeds in the county treasury to the credit of the drain fund, to be disbursed as herein provided. The county treasurer shall safely keep all such bonds until sold as above provided.

Ch. X, Sec. 15 (1927) In cases where the commissioner determines that the taxes assessed for benefits received shall be collected in more than one installment, said commissioner by and with the written approval of the judge of probate and the county treasurer of the county, may borrow money in anticipation of the collection of such installments and may issue as evidence thereof the bonds of the drainage districts as hereinbefore defined. Such obligations shall specify on their face that they are payable out of the installments of drain taxes to be thereafter collected, and the amount thereof shall not exceed the aggregate of the installments levied. Bonds issued hereunder shall be signed by the commissioner on behalf of the drainage district, shall be countersigned by the county clerk and shall be payable in annual installments equal in number to the installments of taxes, shall mature not earlier than March first nor later than June first of the year following the due dates of the respective installments of taxes. The number of installments shall not exceed fifteen and the amount of each installment shall be fixed by the commissioner to correspond as near as may be to his estimate of the amount of taxes actually collectible each year. The commissioner

shall prescribe the form of the bond by and with the written approval of the judge of probate and the county treasurer of the county shall therein pledge the credit of the drainage district, including the lands embraced within such district and the townships, cities, villages, counties and state trunk line highways assessed at large, in the proportion that they are taxed for the benefits received thereby: Provided, That the written consent as above set forth of any judge of probate or county treasurer shall not be required in proceedings relating to inter-county drains. Such bonds shall be advertised and sold by the drain commissioner after the manner provided for the advertisement and sale of municipal bonds by act number two hundred seventy-three of the laws of nineteen hundred twenty-five and any amendments which may be made thereto governing such advertisement and sale. If any premium is received thereon such premium shall belong to the fund of the drain. The proceeds derived from the sale of such bonds shall be deposited with the county treasurer to the credit of the drain fund. The county treasurer shall safely keep all such bonds until sold as above provided. In case the amount available in the drain fund shall be insufficient to pay the principal or interest of any such bonds heretofore or hereafter issued when they become due the same shall be advanced and paid by the county out of its general funds and reimbursement to said general fund shall be made out of the drain taxes thereafter collected, provided that such advancement by the county shall not cause the total debt of the county to exceed the constitutional limitation thereof.

Ch. X, Sec. 16 (1923) In cases where bonds are issued and sold by the commissioner all installments of the drain taxes subsequent to the first installment shall bear interest at the rate of six per cent per annum from the date of the preparation of the assessment roll until due. Such bonds may provide, if the commissioner so determines, for the payment of interest semi-annually. All of said subsequent installments and the interest thereon shall, as collected, be paid into the county treasury and there placed to the credit of the fund of the drain to be used solely for the payment of bonds as the same shall mature. All moneys thus collected in anticipation of the maturity of the bonds shall be depos-

ited by the county treasurer in a bank or banks to be designated by the board of supervisors of such county and the interest received shall belong to the fund: Provided, however, That any bank receiving county drain funds hereunder shall give bond to the county treasurer in an amount not less than the sum so deposited.

Ch. X, Sec. 18 (1923) If there is not sufficient money in the fund in a particular drain at the time of the maturity of the bonds last to mature to pay the same with interest, it shall be the duty of the commissioner to at once levy an additional assessment as hereinbefore provided in such an amount as will make up the deficiency. Any surplus remaining after the payment of the bonds and interest shall remain in the county treasury and be used for the maintenance of the drain.

Ch. XVII, Sec. 5 (1925) Any county drain may be used for sewage disposal by any city, village or township for which it shall be available, but shall be kept cleaned out or enlarged as the county drain commissioner may determine to be necessary for the carrying off of the sewage and the natural flow of said drain at the expense of the city, village or township using the same, and if used by more than one, the expense to be borne by each shall be determined by the board of supervisors. Disposal plants, filtration beds and other mechanical devices as will properly purify the flow of any drain may be constructed and become a part of any established drain, the cost of construction therefor to be paid for in the same manner as other drainage costs as in this act provided. Such plants, beds, or devices may be described in the petition for the location, establishment and construction of drains or in the petition for the cleaning, widening, deepening, straightening or extending of drains, or in the application for the laying out of a drainage district. Petitions for the construction of such plants, beds and devices for use on any established drain may be filed by the same persons and shall be received and all proceedings had thereon in the same manner as other petitions for any drainage construction under this act. Plans and specifications for the construction as part of a drain of any disposal plant, filtration bed or other mechanical device to

properly purify the flow of such drain shall be prepared, subject to the approval of the state commissioner of health, and shall be filed with the drain commissioner. Contracts for such construction shall be let in the manner provided in chapter eight of this act. To meet the cost of such construction the drain commissioner shall apportion the per cent of such cost among the several parcels of land, highways and municipalities benefited thereby. The costs and charges for maintenance shall be apportioned and assessed each year. In case the apportionment shall be the same as the last recorded apportionment, no day of review shall be necessary, but in case the apportionment shall be changed, notice of a day of review shall be given to such persons or municipalities whose percentage has been raised. Lands may be acquired as a site for the construction of such plants, beds and devices, and releases thereof may be obtained in the same manner as other lands for right of way as in this act provided.